Ernst Home Centers, Inc. *and* United Food and Commercial Workers Local 1001, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 19–CA–20543

September 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 29, 1991, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief to the General Counsel's limited exceptions, and an answering brief to the Charging Party's cross-exceptions. The General Counsel filed limited exceptions and a supporting brief. The Charging Party filed cross-exceptions, a brief in support of its cross-exceptions, and a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

1. The General Counsel and the Charging Party except to the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by providing employee Jovanavich with language to be used in a decertification petition. The judge found that the Respondent's compliance with Jovanavich's request for petition language did not amount to undue employer encouragement to file a decertification petition, but rather amounted to mere ministerial aid to one who had decided of her own volition to file a decertification petition. The General Counsel and the Union argue, inter alia, that the Respondent's actions amount to more than mere ministerial aid because Jovanavich decided to file a decertification petition only after it was suggested by the Respondent. We agree with the judge that the evidence does not establish that the Respondent unlawfully encouraged Jovanavich to file a decertification petition.

The record establishes that Jovanavich, a new employee, spoke with Jennings and Norris, officials in the Respondent's human resources department, about how to avoid joining the Union. Jovanavich testified that Jennings and Norris said that ''they could not help me in any way, that I had to contact the NLRB for them to outline how I should proceed, what kinds of things I could do. They could answer questions for me if I asked them but they wouldn't assist me in any way.'' Also during this conversation, Jovanavich asked Jennings how she could get some ''verbiage'' for a petition. Jovanavich was told to contact her store manager, John Philips, who on request provided Jovanavich with language for a decertification petition.

The General Counsel and the Charging Party argue that this evidence demonstrates that the decertification petition would never have been filed but for the Respondent's suggesting to Jovanavich that she file a decertification petition. We disagree. We conclude that the evidence does not answer the question of who, if anyone, suggested or encouraged Jovanavich to file the decertification petition. Thus, the evidence merely proves that the Respondent replied to Jovanavich's request for petition language. Such conduct, without more, does not constitute a violation of Section 8(a)(1) of the Act. *Eastern States Optical Co.*, 275 NLRB 371 (1985).

2. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally altering the established practice of permitting the Union's business representatives to have limited conversations with the Respondent's employees on the sales floor of the Respondent's stores. Specifically, the judge found that the Respondent unilaterally prohibited the Union's business representatives from speaking with employees in all areas except the breakroom or lunchroom. The Respondent excepts to this finding and argues, inter alia, that the change was not a material one and thus the Respondent was not obligated to bargain with the Union over the change.

In support of its argument that the change was not material, the Respondent cites *Peerless Food Products*, 236 NLRB 161 (1978). In that case, the Board dismissed an allegation that the employer violated Section 8(a)(5) of the Act when it unilaterally imposed on the union's business representative limitations on nonemployee access to the production areas in the employer's packing plant. The union's business representative had previously enjoyed unlimited access to employees

[1] No exceptions were filed to the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by circulating memoranda promising benefits to employees if the Union was decertified, by Store Manager Davidowitz' promising employee Spaulding that the Respondent would give raises based on merit if the Union was voted out, by Store Manager Olsen's circulating a petition seeking decertification, and by Store Manager Carlsen's asking an employee if he had signed the petition.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to pass on the judge's finding that Store Manager Davidowitz violated Sec. 8(a)(1) of the Act by asking employee Jovanavich for the names of employees who had not signed the petition. This finding is cumulative of other findings in this case and would not affect the remedy.

in the production area in connection with his duties. The employer unilaterally decided to limit access to the production area to persons whose presence was necessary or required. As a result of this new rule, the union's business representative was limited to meeting with employees in the lunchroom during break and lunch periods. The union's business representative was offered, at his request, the use of private facilities at the plant to consult or converse with any aggrieved employee, plus access to the plant at lunchtimes or breaktimes to consult with them.

The Board found that the net effect of the change in policy was to remove the business representative's right to engage employees in conversations on the production floor when those conversations were unrelated to contract matters. The Board concluded that this change did not significantly reduce employee access to the union's business representative and consequently dismissed the complaint.

We find—in balancing the competing rights involved—that the unilateral change at issue in *Peerless* is distinguishable from the unilateral change at issue in the instant case. First, we note that *Peerless* involved access to employees in the production area of a packing plant, and the instant case involves access to employees on the sales floor of a store. While the union representative in *Peerless* enjoyed access to all employees during the plant's lunchtimes or breaktimes, there is no evidence that the Respondent's employees had a uniform breaktime or lunchtime when they all could be accessible to the Union's business representative. Thus, limited access to employees on the sales floor afforded the Union's business representative the means to communicate with as many employees as necessary during the representative's visit to the store.

Second, we note that in *Peerless*, the union's access to employees in the production area was not necessary in order to afford the union an opportunity to investigate grievances. When the employer implemented its restriction of nonemployee access to the production areas, the union representative was offered, on request, the use of private facilities to meet with any aggrieved employee.

In the instant case, the Union's access to employees on the sales floor afforded the Union's business representative the opportunity to communicate with each employee in the store, to inquire if any employees had matters to discuss with the representative, and, if necessary, to arrange a time for the employee to have an extended discussion with the representative in the breakroom or lunchroom. The employer in *Peerless* offered the union representative alternative access to employees when the new rule was instituted. The Respondent in the instant case did not even acknowledge the existence of a change in policy, and thus did not offer the Union an alternative means of access to the employees, as necessary, during visits to the Respondent's store.

We therefore find in balancing the competing rights that the instant case is distinguishable from *Peerless*. In agreement with the judge, we find that the Respondent's unilateral change in the practice concerning in-store visitations by the Union's representatives was a material change about which the Respondent was obligated to bargain.

3. The judge found that the Respondent violated Section 8(a)(1) of the Act by granting Jovanavich greater in-store access to employees to promote decertification than it granted representatives of the Union. In its exceptions, the Respondent argues, inter alia, that this finding is based on an issue, disparate treatment, that was not pleaded or litigated. Further, assuming that this issue was pleaded and litigated, the Respondent argues that there is no evidence that the Respondent was aware that Jovanavich conducted any conversations with employees while on the sales floor of the Respondent's stores. We disagree with both of these arguments.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by permitting Jovanavich ''to contact unit employees in the stores where they were employed throughout the unit for purposes of discussing and distributing a decertification petition.'' In response to the Respondent's motion for a bill of particulars, the General Counsel alleged that ''Jovanavich was either permitted in Respondent's stores contrary to a posted no-access rule for off-duty employees, or . . . was permitted in Respondent's stores while on duty as a paid employee of Respondent.''

Jovanavich testified that, on her own time, she visited several of the Respondent's stores. When visiting these stores, Jovanavich would contact a few employees on the sales floor, identify herself, and tell employees that she would be in the breakroom if they wished to discuss the decertification petition.[3]

The judge did not find either that Jovanavich violated a posted no-access rule or that Jovanavich visited other stores while on duty. The judge did find, however, that Jovanavich was given greater access to employees during visits to the Respondent's stores to promote the decertification petition than that given to the Union's business representatives during their visits to the Respondent's stores. The judge concluded that by granting Jovanavich access to employees on the sales floor while denying the Union similar access, the Respondent violated Section 8(a)(1) of the Act.

In its exceptions, the Respondent argues that, as the General Counsel neither alleged nor argued to the judge that Jovanavich was given greater access to employees than that enjoyed by the Union's representa-

[3] Jovanavich also stated that in some stores she did not contact employees on the sales floor.

tives, the Respondent had no notice that a disparate treatment issue might exist. The Respondent argues that had it known that disparate treatment was at issue, it would have provided evidence of the precise nature of Jovanavich's visits and would have asked Jovanavich for a detailed and exact description of her store visits. We do not find this argument persuasive. The judge's finding is closely related to the 8(a)(5) issue discussed above, which *was* pleaded and fully litigated. Further, the finding is based on Jovanavich's own description of her visits to the Respondent's stores. The Respondent does not suggest how further evidence regarding the nature of Jovanavich's activities on the sales floor would lead to a contrary result.

As noted above, the Respondent also argues that the judge's finding is in error because there is no evidence that the Respondent was aware that Jovanavich engaged in conversations with employees on the sales floor of the Respondent's stores. The record establishes that the Respondent knew that Jovanavich was leading a decertification drive, that she sent status reports on the decertification effort to all store managers, that she called each of the stores, that she discussed the petition with store managers, that on several occasions she spoke with employees on the sales floor of the Respondent's stores, and that she was never told not to speak with employees on the sales floor. During the same period the Respondent vigorously prohibited the Union's representatives from speaking with employees on the sales floor.[4] From these facts, we infer that the Respondent, through its managers, closely monitored those, other than customers, who contacted employees on the sales floor, that it was aware that Jovanavich was visiting other stores to promote decertification, and that the Respondent permitted Jovanavich to contact employees on the sales floor. We therefore agree with the judge that the Respondent violated Section 8(a)(1) of the Act by granting Jovanavich greater access to employees on the sales floor than that enjoyed by the Union's representatives.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ernst Home Centers, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[4] On several occasions, the Respondent threatened to have the Union's business representative arrested or escorted from the store if the representative spoke with employees on the sales floor.

S. Nia Renai Cottrell, Esq. for the General Counsel.
Robert Pattison and *Leslie M. Mitchell, Esqs.*, of San Francisco, California, for the Respondent.
Mark E. Brennan, Esq., of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in Seattle, Washington, on March 12–16, 1990.

The complaint, later amended, issued on October 12, 1989. It derives from a charge filed on September 14, 1989, by United Food and Commercial Workers Local 1001, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union).

The complaint as now constituted alleges that Ernst Home Centers, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) at certain of its greater Seattle stores in June, July, and August 1989 by specified acts designed to promote the Union's decertification as the collective-bargaining agent of Respondent's employees. The complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act in July and August 1989 by unilaterally and restrictively changing the practice concerning in-store visitations by union officials.

II. JURISDICTION AND LABOR ORGANIZATION

Respondent, a Washington corporation, operates some 73 retail stores in several Western States. The pleadings establish and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The pleadings also establish and I find that the Union is a labor organization within Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. *Background*

Since 1969, the Union has represented Respondent's employees in this bargaining unit:

> All general sales clerks, cashiers, sales specialists, store helpers, custodians, janitors, and mechanics employed at [Respondent's] retail establishments and the Distribution Center within King County and Snohomish County within the jurisdiction of [the Union], but excluding all other employees, guards, and supervisors as defined in the Act.[1]

The unit at relevant times embraced approximately 600 employees at 24 locations—23 stores and the Distribution Center. Those employees are covered by a collective-bargaining agreement running from November 1, 1989, through October 31, 1992. They previously were covered by a 3-year agreement that expired on October 31, 1989.

In mid-June 1989, Linda Horton, a nursery clerk in Respondent's downtown Bellevue store, prepared and posted a petition seeking the Union's ouster. On June 30, in reaction to this development, Susan McNab, Respondent's senior vice president for human resources, conducted a training session for the several store managers. The session dealt with issues raised by decertification activities, and those attending received a ''packet of papers,'' including a ''sample'' decertification petition.

[1] The parties agree, and I find, that this is an appropriate unit for purposes of the Act.

On about June 30, as well, Charmaine Jovanovich, a part-time employee in Respondent's Bear Creek Village store, launched a decertification campaign apparently unrelated to Horton's. Hired the preceding month, she had recently received a letter from the Union advising her of her obligation under the union-security provision of the bargaining agreement; and, when she called the Union for clarification, she was told either to join or quit her job. This, Jovanovich testified, ''prompted'' her decertification activities.

Those activities included conferring with McNab and Clark Jennings, director of human resources; discussing the situation with store managers; mailing fliers to unit employees and store managers;[2] promoting and overseeing the solicitation of employee signatures on petitions; personally visiting various of the stores; and, on August 28, filing an ''RD'' petition—that is, a petition for a decertification election—with the Board.[3]

Jovanovich testified that she assumed the expense of preparing, duplicating, and mailing the fliers. The General Counsel does not contend that Respondent hired her to spearhead the decertification effort.

B. *Respondent's Allegedly Unlawful Promotion of Decertification*

1. Store Manager Phillips' alleged misconduct

a. *The pleadings*

Paragraph 6(a) of the complaint alleges that on about June 30, 1989, John Phillips, the store manager at Respondent's Bear Creek Village store, ''provided . . . Jovanovich with language to be used in a decertification petition.'' Paragraph 14 alleges that this conduct violated Section 8(a)(1).

The answer admits that Phillips engaged in the conduct alleged, but denies that it was improper.

b. *The evidence*

The afternoon of June 30, at the Bear Creek Village store, Jovanovich initiated a conversation with Phillips in which she asked ''what wordage'' she should use on an employee petition seeking the Union's decertification. Phillips responded, ''Charmaine, are you asking me for some verbiage to be used on the petition?'' and she said, ''Yes.'' Telling her to ''wait just a minute,'' Phillips retrieved the sample petition McNab had distributed at that morning's training session, and ''read to Jovanovich the wordage'' in it. She wrote as he read.

The language:

> We the undersigned employees of Ernst Home Centers, Inc., no longer wish to be represented by United Food & Commercial Workers and its Local Union 1001 and wish to have the National Labor Board conduct an election.

Jovanovich previously had asked Clark Jennings how to get decertification ''verbiage.'' He told her to ''contact'' Phillips.

c. *Conclusion*

The Board has stated that ''it is unlawful for an employer to initiate a decertification petition,'' but that the ''rendering of what has been termed 'ministerial aid' . . . in a 'situational context free of coercive conduct''' is permissible; that ''the essential inquiry is whether the 'preparation . . . of the petition constituted the free and uncoerced act of the employees concerned.''' *Eastern States Optical*, 275 NLRB 371, 372 (1985).

Although the circumstances surrounding the incident in question raise a healthy suspicion of undue employer encouragement, the evidence indicates that Jovanovich had decided, of her own volition, to seek the Union's ouster before approaching Phillips, and that his compliance with her request for petition language did not impart additional thrust to that predetermined goal.

I therefore conclude that Respondent did not violate the Act by this conduct. *Eastern States Optical*, supra at 372; *Washington Street Foundry*, 268 NLRB 338, 339 (1983); *Cummins Component Plant*, 259 NLRB 456, 461 (1981); *Poly Ultra Plastics*, 231 NLRB 787, 790 (1977); *KONO-TV*, 163 NLRB 1005, 1006 (1967); *WTVC*, 126 NLRB 1054, 1058–1059 (1960); and *Hazen & Jaeger Funeral Home*, 95 NLRB 1034 (1951).

2. McNab's alleged misconduct

a. *The pleadings*

Paragraph 6(b) of the complaint alleges that, on about July 6, 1989, McNab ''provided . . . Jovanovich with the names and home addresses of the 700-plus employees in the unit.'' Paragraph 14 alleges that this conduct violated Section 8(a)(1).

The answer admits that McNab gave Jovanovich names and addresses, but denies that she thereby violated the Act.

b. *The evidence*

Jovanovich testified that, in early July at the Bear Creek Village store, McNab gave her a printout containing the names, addresses, and hire dates of the several hundred unit employees. Thus assisted, Jovanovich sent four prodecertification fliers to the employees.[4]

McNab testified that she ''met'' with Jovanovich, knowing that she was ''interested in'' decertifying the Union; that Jovanovich ''made a number of requests at that meeting''; and that McNab told her they ''should be put in writing.'' Jovanovich then submitted a written request for employee names and addresses to a McNab aide, Kathryn Norris,[5] according to McNab; and, after consulting with counsel, McNab ''gave the approval'' to release the list.

c. *Conclusion*

Again, although one cannot help but suspect the contrary, the evidence affords no objective basis for inferring that

[2] In one of the fliers, Jovanovich referred to herself as ''Petition Central.''

[3] Docketed as Case 19–RD–2834. I am administratively advised that the Regional Director dismissed the petition on October 17, 1989. His dismissal letter explaining that Respondent had ''unlawfully assisted and encouraged'' the petition and citing the present complaint. Respondent appealed the dismissal to the Board. The Board denied the appeal by order dated December 28, 1989.

[4] The fliers were dated July 1, 6, 10, and 29.

[5] Norris' formal job title: human resources generalist.

management induced Jovanovich to request the list, or that its accommodation of that request lent other than ''ministerial aid'' to her self-inspired antiunion crusade. I thus conclude that Respondent did not violate the Act by this conduct. *Eastern States Optical*, supra, 372; *Montgomery Ward & Co*., 187 NLRB 956, 960–961 (1971); and *Consolidated Rebuilders*, 171 NLRB 1415, 1417 (1968).

3. Respondent's allegedly unlawful memoranda

a. *The pleadings*

Paragraph 6(c) of the complaint alleges that, by memoranda dated July 14 and 25, 1989, Respondent ''advised employees in the unit that Respondent would maintain contractual terms and conditions of employment if the Union were voted out and promised job security if the Union were voted out.'' Paragraph 14 alleges that Respondent consequently violated Section 8(a)(1).

The answer admits that memoranda of those dates were circulated, and that they said the employees would not lose jobs or benefits if the Union were decertified. The answer denies that this was improper.

b. *The evidence*

The July 14 memorandum, signed by McNab, stated:

> I wanted to write to you about what has come up this week because many of you have raised questions regarding your payment of dues, initiation fees, and general representation by Local 1001. As you probably know, several of your peers have begun an effort to gather signatures requesting the National Labor Relations Board to hold a secret ballot election to determine if you still wish to be represented by Local 1001. This movement was begun by employees in our stores. Regarding the petition that they are circulating, you should realize that all this represents is the request to hold an election. This process is specifically authorized by law; each of you is free to participate or to decline as you see fit. Our position regarding this issue is that we, as always, will respect the rights of each of you and will heartily support your right to make a personal and independent decision.
>
> Not surprisingly, Local 1001 is disturbed by this call for a democratic election conducted by the Labor Board. If you choose to continue to pay dues and initiation fees as a member of Local 1001, we will, of course, support that decision. If, on the other hand, you want to have an election to determine whether you wish to continue to pay for the union, we will support that decision, also.
>
> Many of you have indicated that you have received confusing information on this issue from Local 1001. Specifically, Local 1001 is claiming that Ernst Management hired an employee to instigate this effort. THIS IS ABSOLUTELY FALSE. No one should believe a tactic so often used by unions whenever their self-preservation and income is threatened by democratic, lawfully sanctioned procedures.
>
> In addition, we understand that you are being told that if you sign the petition for an election that you are signing your rights away. ONCE AGAIN, THIS IS ABSOLUTELY FALSE. By signing this petition, you are giving away absolutely nothing. All you are doing is requesting that an election be held so that each of you may make your own choice. At Ernst only 23 of our 73 stores have employees represented by a union. As a matter of fact, two years ago, the hourly employees at the Ernst Corporate Offices undertook the same procedure and determined that they did not wish to be represented by Local 1001. For over two years now, they have not been paying any dues.
>
> It is important for you to understand that your fellow employees have started this process. Local 1001's claim that Ernst began the process is possibly defamatory. I have indicated this in the attached letter to Joe Peterson, your union president, which was mailed today. In that letter, I have asked him why Local 1001 is afraid of an election. After all, even the President of the United States has to run for office every four years. If you so decide to put Local 1001 to the test of winning an election, it is your right to do so and the Company supports you in that decision, whatever it may be.
>
> Please feel free to discuss this issue with me, anyone else from the Human Resources Department, or your store manager.
>
> Ernst is a solid and successful Company, thanks to the teamwork of its employees. We will continue to strive to maintain an environment of respect and dignity for every individual, employee and customer alike. We support our employees' right to choose and we will respect your collective judgment on this important matter.

The July 25 memorandum, signed ''Ernst Management,'' stated:

> The decertification campaign is heating up. Local 1001 is sending out fancy misleading memos. Business agents, often for the first time in months, are visiting stores. Meetings, supposedly to discuss negotiations, are being held. All of this has one general theme—if you get rid of the union terrible things will happen to you.
>
> NOT TRUE!
>
> Let's get it straight. First, while Ernst cannot promise you anything if Local 1001 is voted out, we can assure you that you will lose nothing if that does happen.
>
> Second, terrible scary things won't happen to anyone. That didn't happen when the office clerical staff voted out the union. It doesn't happen in our union-free stores. It won't happen because we try to be a fair and professional employer.
>
> What will change if Local 1001 is defeated? You won't have to pay dues and initiation fees to work here. The union will not ask us to fire 40 people a month under the union shop clause. We won't have to worry about the upcoming negotiations, which sometimes break down as we've seen with the grocery workers, the nurses and the shipbuilders.
>
> For over 20 years, Ernst employees have paid millions of dollars in fees to Local 1001. Now it is time to decide, in a democratic, secret ballot vote, if you still want to do that. After all, a vote of choice is your right—it's very American, as are unions. By signing the petition, you do no more than exercise your right to choose—nothing more!

c. *Conclusions*

The memoranda, particularly that of the July 25, left no doubt that Respondent favored decertification. Neither, however, went beyond assuring the employees that Respondent would respect their individual and collective decisions on the decertification issue, and that they would ''lose nothing'' should decertification result. I conclude that Respondent did not exceed ''the permissible bounds of merely assuring retention of the status quo'' through these documents, and therefore did not violate the Act by this conduct. *Weather Shield Mfg*., 292 NLRB 1 (1988). See also *Fabric Warehouse*, 294 NLRB 189 (1989); *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983); and *El Cid*, 222 NLRB 1315, 1316 (1976).

4. Respondent's allegedly improper support of Jovanovich's decertification activities in various stores

a. *The pleadings*

Paragraph 6(d) of the complaint alleges that, in July and August 1989, Respondent permitted Jovanovich ''to contact unit employees in the stores where they were employed throughout the unit for purposes of discussing and distributing a decertification petition.'' Paragraph 14 alleges that Respondent thereby violated Section 8(a)(1).

The answer admits the factual allegation, but denies the legal conclusion.

b. *The evidence*

After obtaining petition language from Store Manager Phillips, Jovanovich visited several of the stores to promote the cause. She testified that she did this entirely on her own time; that she called on perhaps ''five stores more than twice''; and that her procedure was to contact employees on the sales floor, identifying herself and her mission and telling them she would be in the breakroom should they wish to discuss decertification with her. She added that the sales-floor conversations were brief, lasting ''a minute or two''; and involved ''very few'' employees—'' in some stores, none; in other stores, maybe one, maybe two, maybe three.''

McNab testified that off-duty employees are ''free to visit stores,'' and that in-store employee-to-employee solicitation is ''generally . . . permissible so long as it doesn't occur while they're working on the floor'' or does not interfere with ''the business of the company.'' Phillips substantially corroborated McNab in this regard, as did Dawn Wyland, a customer service coordinator at Respondent's Sea-Tac Village store. By contrast, as I conclude later here, Respondent violated Section 8(a)(5) and (1) during the decertification drive by unilaterally imposing new limitations on in-store visitations by union representatives—that they ''meet with employees in the breakrooms'' and that ''if they wished to speak to specific employees, they would inform the store manager and the employee would be released from work to speak to the union agent.''[6]

Phillips testified that he told Jovanovich, upon providing her with petition language, that she could not ''do any of this on company time or anything.'' He denied letting her leave the store to solicit decertification signatures while on the clock. He also denied any awareness that she solicited signatures in his store ''on working time.'' Thomas Quinn, the assistant manager of the Bear Creek Village store, testified that he never permitted Jovanovich ''to leave the store while she was on the clock to work on the petition,'' and that she did not circulate a petition at Bear Creek Village ''while she was on working time.''

Seeking evidence that Jovanovich visited the various stores while on the clock, the General Counsel subpoenaed, but Respondent did not produce, the Bear Creek Village store's work schedules for July 22 to August 20, 1989. Jane Nicholls, the store's office coordinator, testified that schedules dating back to 1986 are in an unlocked file in her office, but that those for July 22 to August 20—and only that period—are unaccountably missing. She professedly discovered this in September or October 1989 when Kathryn Norris, McNab's aide, asked for the June-through-August schedules. Quinn, the assistant store manager, confirmed that the schedules in question were ''missing from the files,'' and that he had ''no idea why''; and Respondent's counsel, Pattison, represented on the record, ''We cannot explain their absence.''

Nicholls testified that, although the employees themselves are supposed to sign their timesheets before being paid, she signed for Jovanovich in seven of the eight biweekly pay periods from early June to mid-September 1989. Nicholls also testified that this is not unusual, especially as concerns part-time employees; and that she signed for ''at least 10'' of the approximately 30 employees on the store payroll in a given pay period, ''so that they'd be paid.'' Laurel Kyle, a business representative for the Union, testified that she knew of this practice.[7]

c. *Conclusion*

The record contains no persuasive evidence that Respondent sponsored or endorsed Jovanovich's visitations to the several stores by allowing her to do so while on the clock.[8] Nor does it establish that Respondent granted her off-duty access to those on duty beyond that customarily permitted off-duty employees when soliciting coworkers.

The weight of evidence does indicate, on the other hand, that Jovanovich enjoyed greater visitational latitude when promoting decertification than did representatives of the Union under the limitations Respondent unlawfully imposed during the decertification effort. I conclude that, by granting Jovanovich this greater access, Respondent violated Section 8(a)(1). *D'Alessandro's*, 292 NLRB 81, 83 (1988); *Houston*

[6] Quoting from a position letter from Respondent's attorney to the Board agent investigating the charge.

[7] Kyle recounted a time she protested to Kathryn Norris Respondent's withholding a paycheck because the employee-payee had not signed her timesheet. Kyle argued to Norris that she could not believe Respondent would ''hold up'' this check, inasmuch as ''the bookkeepers had been signing for years.''

[8] Although the unexplained disappearance of certain work schedules is troubling, I decline to draw an inference adverse to Respondent because of that. Other schedules, in evidence, raise a substantial doubt that those missing would disclose Jovanovich's whereabouts at any given time. In addition, I credit Nicholls that the cabinet containing them was accessible to anyone and that she could not account for their disappearance. Nor do I read anything sinister into Nicholls' signing a number of Jovanovich's timesheets, given the convincing evidence that this was a common practice.

Coca-Cola Bottling Co., 265 NLRB 766, 777 (1982); and *Cherokee Sportswear*, 178 NLRB 233, 233 (1969).

5. Store Manager Davidowitz' alleged misconduct

a. *The pleadings*

Paragraph 8 of the complaint alleges that, from July 8 to August 28, 1989, Gadi Davidowitz, the store manager at Respondent's Totem Lake store, ''supported, approved, and encouraged circulation of a petition seeking decertification,'' ''urged and solicited employees to sign a petition seeking decertification,'' and ''interrogated employees as to whether the employees had signed a petition seeking decertification.'' Paragraph 8 also alleges that, on about July 12, 1989, Davidowitz ''told an employee that he could award raises based upon merit, rather than hours worked, if the Union were voted out.'' Paragraph 14 alleges that Respondent violated Section 8(a)(1) in each instance. The answer denies these allegations.

b. *The evidence*

Matt Reeves, an employee at the Totem Lake store, testified that he had ''numerous'' conversations with Davidowitz about decertification. In the first conversation, Reeves elaborated Davidowitz asked him if he had ''heard about the petition,'' if he knew ''if there was one in the store,'' and if he was ''carrying the petition.'' Reeves by then had obtained a petition from Jovanovich, but had not brought it to work. He answered yes to each of Davidowitz' questions, as he recalled, prompting Davidowitz to ask if anyone had signed the petition. Reeves answered no, that he had ''forgotten it at home''; and Davidowitz rejoined, ''Okay, just try and remember it tomorrow.''

Reeves' recital continued that he brought the petition to work the next day, and thereafter had a number of conversations with Davidowitz, all ''very brief,'' in which Davidowitz ''ask[ed] how the petition was going, if people were supporting it,'' ''who had signed it,'' and ''who hadn't signed it.'' Reeves assertedly ''gave him a few names'' of those who had and had not signed.

Reeves testified, as well, that he heard Davidowitz say to employees ''on a couple occasions'': ''I understand you haven't signed the petition. Do you have any questions about the petition? Why haven't you signed?''

Reeves' enthusiasm for the cause eventually waned, and he stopped promoting the petition.

Davidowitz admittedly discussed the petition with Reeves ''on numerous occasions.'' He testified that, having heard that Reeves had the petition, he told Reeves he was ''there to help him'' if he wanted assistance or to have questions answered. Davidowitz enlarged, with regard to one such conversation:

> I just mentioned to him that if there was any questions that he's not sure of or if any of his counterparts need any help or assistance or any factual answers, that I could phone Sue McNab or anybody at head office to find out

Davidowitz denied that he asked Reeves to bring the petition to work, or to solicit employees to sign it, or who had and had not signed.

Melissa Reynolds, a cashier at the Totem Lake store, testified that Davidowitz once asked her if she was going to or had signed the petition. Davidowitz then stated, according to Reynolds, that ''people that were higher up would have to work harder for their pay'' if the Union were out, ''and others would get more hours and be able to move up quicker.'' Reynolds placed this conversation in the breakroom, in mid-July, in the presence of ''a couple other people.''[9]

Davidowitz testified that he could not recall ever talking to Reynolds ''one on one'' about the petition, and denied ever asking her if she was going to sign it. He also denied that he ever spoke to her about how she might benefit from the Union's ouster.

Jerry Klep, a lumber salesperson at the Totem Lake store, testified that Reeves told him, in Davidowitz' presence, that he had a decertification petition; and that, when Klep asked to see it, Davidowitz interjected, ''It would probably be to your benefit to sign.'' Klep added that this encounter took place August 10, at the front desk, and that he signed the petition that night. Klep further testified that he and Davidowitz had had ''prior conversations'' about decertification, during which Davidowitz ''made it clear'' that ''there would be a lot better wages for people in the store'' if it succeeded.

Davidowitz concededly discussed the petition with Klep, in Reeves' presence. He testified that Klep asked him if he should sign, and he replied, ''It's up to an individual to make his own decision what is right and wrong.'' Klep then asked, per Davidowitz, if he would sign, and Davidowitz said he would. Davidowitz denied telling Klep that he should sign, that signing would be to Klep's benefit, or that Klep's pay would improve without the Union. Davidowitz added:

> I did mention, and I always used to say, that if they want exact facts, since we are not allowed to say anything about getting raises or anything, they should phone a nonunion store. And I always refer to Woodinville, because it's close and they know people there . . . and I ask them to phone friends of theirs and find out facts of their salaries and what benefits they have.

William Spaulding, another Totem Lake employee, testified that Davidowitz told him, ''a short time after'' Spaulding had signed Reeves' petition, that ''if we did vote the Union to be out, he would give raises based on merit, based on our own work performance.'' Spaulding later clarified that Davidowitz was ''drawing comparisons'' between the practices in Respondent's union and nonunion stores, and that Davidowitz never told him he would get a merit increase if the Union were voted out.[10]

Davidowitz acknowledged that he spoke with Spaulding, but not ''necessarily one on one.'' Although not disclosing what he said, he denied suggesting that Spaulding would get a raise if the Union were gone.

Jovanovich testified that she called various of the store managers about the petition, including Davidowitz, and that

[9] Whom she did not identify.

[10] Spaulding expanded that, although Davidowitz ''did not actually say'' he would get a merit increase should decertification occur, ''it seemed like he was insinuating that he would'' inasmuch as Davidowitz had ''acknowledged'' he was ''a good employee.''

he asked her who had not signed. Davidowitz testified that he knew Jovanovich ''was behind the petition effort,'' and that he and she spoke about it by telephone ''several times.'' He did not divulge the content of those exchanges, however, apart from Jovanovich's telling him she had given a petition to Reeves.

c. *Conclusions*

I conclude that Davidowitz violated Section 8(a)(1) in several respects.

1. Based on the testimony of Matt Reeves:[11]

a. By initially asking Reeves if he had ''heard about the petition,'' if he knew ''if there was one in the store,'' if he was ''carrying the petition,'' and if anyone had signed it.

Under all the circumstances—in particular, that Davidowitz was the ranking management person in the store, that he broached the subject of the petition, that Reeves to then had not openly disclosed his sentiments on that issue, that the questions were progressively more pointed, that they served no legitimate purpose, and that Davidowitz did not accompany them with assurances against reprisal—this line of interrogation reasonably tended to interfere with, restrain, or coerce Reeves in the exercise of his Section 7 rights. See generally *Pennsy Supply*, 295 NLRB 324 (1989); *UARCO*, 286 NLRB 55, 55–56 (1987); *Meda-Care Ambulance*, 285 NLRB 471, 472 (1987); *United Artists Communications*, 280 NLRB 1056, 1056–1057 (1986); *Raytheon Co.*, 279 NLRB 245, 246 (1986); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985); and *Noral Color Corp.*, 276 NLRB 567, 571–574 (1985).

b. By urging Reeves, in the same conversation, to ''just try and remember'' to bring the petition to work ''tomorrow.'' This adjuration perforce took on the coercive stigma of the unlawful interrogation that immediately preceded it.

c. By recurrently asking Reeves, thereafter, how the petition ''was going'' and if people were ''supporting it.'' The persistence of these questions, in combination with Davidowitz' earlier unlawful utterances to Reeves, deprived them of all innocence.

d. By asking Reeves from time to time who had and had not signed the petition. As the Board stated in *Liquitane Corp.*, 298 NLRB 292, 293 fn. 4 (1990):

> [P]robing attempts by a supervisor to find out from employees about the specific union activities of other employees, who had not disclosed their attitudes toward the union, had a reasonable tendency, under the circumstances, to interfere with, restrain, and coerce those employees in the exercise of their rights.

See also *Salvation Army Residence*, 293 NLRB 944, 973 fn. 107 (1989); *Hillhaven Corp.*, 290 NLRB 258 fn. 3 (1988); *Raytheon Co.*, supra at 246.

e. By asking employees, after commenting that he understood they had not signed the petition, why they had not. As part of Davidowitz' demonstrably assiduous monitoring of the petition's progress, these instances of interrogation cannot be separated from his other excesses in that regard.

[11] I credit Reeves that Davidowitz engaged in the conduct attributed to him by Reeves. To the considerable extent their renditions conflicted, Reeves evinced greater sincerity in terms both of demeanor and testimonial content.

2. Based on the testimony of Melissa Reynolds:[12]

a. By asking Reynolds if she was going to or had signed a petition. Various of the considerations making his interrogation of Reeves improper apply in this instance, as well.

b. By his companion remark to Reynolds—that the employees ''would get more hours and be able to move up quicker'' if the Union were gone—which at once imparted additional taint to the interrogation just considered and comprised an unlawful inducement to support decertification.

3. Based on the testimony of Jerry Klep, by telling Klep ''it would probably be to his benefit to sign'' the petition. This, in the context of prior Davidowitz' comments to Klep that ''there would be a lot better wages'' should decertification succeed, likewise comprised an unlawful inducement.[13]

4. Based on the testimony of Jovanovich, by asking her which employees had not signed the petition.

I conclude, finally, that Spaulding's testimony, considered in toto, was too imprecise in separating that which Davidowitz said from that which Spaulding inferred to support a violation.

6. Store Manager Olsen's alleged misconduct

a. *The pleadings*

Paragraph 9 of the complaint alleges that, on about July 14, 1989, Steve Olsen, the store manager at Respondent's Aurora Village store, ''circulated among its employees a petition seeking decertification of the Union.'' Paragraph 14 alleges that Respondent accordingly violated Section 8(a)(1). The answer denies these allegations.

b. *The evidence*

Iris Shannon, an employee at the Aurora Village store, testified that on about July 22 she ''personally saw'' Olsen post a decertification petition on the bulletin board in the employees' lunchroom. She recalled that she had just arrived for work, that ''a couple of'' unnamed coworkers were present, and that she previously had seen the petition on a table in the lunchroom.

Shannon testified that Olsen also posted some prounion literature that day—items Shannon had obtained at a union meeting the night before—despite his professed opposition to the Union.[14]

Bobbi Missey, another Aurora Village employee, testified that she circulated a decertification petition at the store. She expanded:

> At first, I posted it in the breakroom, and that didn't work, so I did it by hand. I put it up numerous amount

[12] To the extent her and Davidowitz' accounts differ, I credit Reynolds. She came across as eminently sincere, whereas Davidowitz' delivery had an unseemly aura of calculation.

[13] I credit Klep where his testimony disagreed with Davidowitz'. He had the more persuasive demeanor, in my view, and was generally more convincing.

[14] Shannon credibly testified that Olsen told her later that day that he ''would not belong to the Union,'' that he ''would not have anyone telling him if he could not work or work if they went on strike,'' and that he did not like the Union because he could hire two or three people for what he was paying Shannon if the store were nonunion.

of times and, when I did, it mysteriously disappeared off the bulletin board.[15]

Missey averred that she is not aware that anyone else posted or circulated a petition at the store.

Olsen did not testify.

c. *Conclusion*

I fail to see that Olsen's posting the petition exceeded permissible ''ministerial aid,'' particularly because he did the same with prounion literature.

7. Store Manager Carlsen's alleged misconduct

a. *The pleadings*

Paragraph 10 of the complaint alleges that on about August 17, 1989, Ken Carlsen, the store manager at Respondent's Ballard store, ''interrogated its employees as to whether employees had signed a petition seeking decertification of the Union.'' Paragraph 14 alleges that Respondent thereby violated Section 8(a)(1). The answer denies these allegations.

b. *The evidence*

Peter Petelle, then a cashier at the Ballard store, testified that he and Carlsen had a mid-August conversation in Carlsen's office in which he asked Carlsen ''what was actually happening with'' the decertification petition. Carlsen in turn asked, according to Petelle, if he had ''signed it'' or had ''looked at it,'' and he replied that he had not.

Petelle testified that he and Carlsen are friends, that this was ''a casual conversation,'' that he was in Carlsen's office ''much of the time'' during his breaks, and that they discussed ''many subjects'' on those occasions.

Carlsen did not testify.

c. *Conclusion*

Given that Petelle and Carlsen were friends, that they commonly engaged in casual conversation in Carlsen's office, that the subject conversation was in that category, that Petelle raised the matter of the petition, and that Carlsen apparently did not ask other than the one question, I conclude that this interrogation did not carry a coercive potential; consequently, that Carlsen did not violate the Act as alleged. See *Churchill's Supermarkets*, 285 NLRB 138 (1987); *Sunnyvale Medical Clinic*, supra at 1217.

8. Store Manager Wilcox's alleged misconduct

a. *The pleadings*

Paragraph 11 of the complaint alleges that in late July 1989 Phil Wilcox, the store manager at Respondent's Sea-Tac Village store, ''promised to maintain terms and conditions of employment if the Union were voted out''; and that, in early August, Wilcox ''supported, approved, and encouraged a petition seeking decertification of the Union.'' Paragraph 14 alleges that Respondent in each instance violated Section 8(a)(1). The answer denies these allegations.

b. *The evidence*

On about July 21, Wilcox called two Sea-Tac Village employees, Linda Farrington and Terri Anthony, to his office, using the store's intercom. Farrington testified that this occurred shortly after she had first seen a decertification petition in the breakroom, and that Wilcox began by saying a ''piece of paper'' was missing from the breakroom. Farrington continued that either she or Anthony asked if he was ''talking about the petition''; and that Wilcox said he was, after which he lectured that it was illegal to do anything with this petition'' and ''unfair to employees . . . not to be able to see the petition.''

Wilcox also stated, according to Farrington, that he had summoned her and Anthony because he had seen their names on a prounion flier and they were among ''only a few people down in the breakroom'' about the time the petition disappeared. Farrington testified that Wilcox ended the session by saying the petition must be returned to the breakroom in 5 minutes. Farrington depicted him as progressively ''more angry'' during this encounter.

Wilcox testified that two employees had informed him, before he paged Farrington and Anthony, that the petition was missing from the breakroom and that they were ''last seen in the area.'' Wilcox recounted that he called McNab, asking if he could speak to Farrington and Anthony ''and have them spread the word to other employees and put it back up.'' McNab replied, according to Wilcox, that ''it was against the law to remove the petition,'' and that it would be ''okay'' for Wilcox to talk to them provided he did not ''threaten and intimidate.''

Wilcox testified that he told Farrington and Anthony that the petition was ''missing,'' that ''some rights [consequently] were just broken,'' that its removal was ''against the law,'' and that he wanted them to ''spread the word, find the petition, and put it back up.'' Wilcox further commented, as he recalled, that the complement appeared to be ''breaking apart all of a sudden'' into pro and antiunion factions, and that ''that can't be''; that ''this has to be like a presidential election,'' with everyone continuing ''to work together as a team'' regardless of the outcome.

Wilcox assertedly ''didn't have any idea who took'' the petition, and denied that he accused Farrington and Anthony of being the culprits.[16] He could not recall what, if anything, Farrington or Anthony said during the encounter. He granted that he ''possibly'' raised his voice.

Virginia Meador, the office coordinator at Sea-Tac Village, testified that she overheard the exchange; that Wilcox told the two employees the petition was missing, that the ''main office'' had told him ''it was illegal for anybody to remove the petition,'' that ''it was everybody's right to make their own decision,'' and that he ''wanted them to spread the word that he wanted the petition returned.'' Anthony asked, per Meador, why she and Farrington had been singled out, and Wilcox said ''it was because they had signed a letter requesting people not to sign the petition.'' Meador described Wilcox's ''tone of voice'' as being ''stern, businesslike.'' Anthony did not testify.

[15] Shannon's affidavit, in evidence, reveals that she ''threw the petition Olsen posted in the garbage,'' and that Missey ''started circulating the petition . . . a couple of days later.''

[16] Anthony approached Wilcox afterwards, reporting that Farrington felt he had accused her, by implication, of taking the petition. He denied to Anthony that that was his intent.

The petition did not resurface for some time. Dawn Wyland, a customer service representative at the store, testified that she found it ''a few weeks later . . . stuck back in the paint department between some cans of paint.''

A few days later, Farrington testified, Wilcox called the employees to his office one by one, giving them the July 25 memorandum previously set forth. Wilcox ''was trying to convince me,'' Farrington continued, that the memorandum ''said nothing would change if we went nonunion.''

Frances Wells, then a customer service coordinator at Sea-Tac Village, testified that when Wilcox called her in he asked if she ''understood the petition and what was going on,'' and if she had ''any questions.'' Wilcox stated, by Wells' account, that ''there would be no changes whatsoever at the store'' if the petition were ''successful.'' Wells shot back that that was ''the problem,'' and detailed certain changes she thought necessary to attract and retain quality help—improved pay at the entry level, for seasoned new hires, and for experienced incumbents of proven quality. Wilcox countered, as Wells recalled, that he could do ''those things,'' that he ''could pay what he felt was necessary,'' if the petition were ''successful''; and that Respondent would have ''policy books'' in lieu of a union contract.

Wells went on that, unmoved, she remarked that Respondent could change policy books ''at any time''—that ''there's binding contracts, and there's policy books.'' Wilcox offered to call ''downtown'' on the point, and Wells said that would not be necessary.

Wilcox testified that he circulated the July 25 memorandum to employees not only in his office, but on the sales floor before opening and in the breakroom. He recalled Wells' saying, when he gave her one, ''As long as Hal Smith has a contract, I'm going to have a contract.'' Hal Smith is Respondent's president. Wilcox rejoined, as best he could remember, that ''that's probably not comparing apples for apples,'' then ''dropped the subject.''

c. *Conclusions*

I conclude that Wilcox violated Section 8(a)(1) during the encounter with Farrington and Anthony about the missing petition. He called them to his office; he told them he did so in part because he had seen their names on a prounion flier;[17] he impliedly accused them of a role in the petition's disappearance by saying they were among ''only a few people down in the breakroom'' at about the time of the disappearance and that that was another reason he called them in,[18] by lecturing them on the illegality and unfairness of tampering with the petition, and by giving an ultimatum that it be returned in 5 minutes;[19] and he displayed growing anger as the meeting progressed.[20] This array of circumstances ineluctably tended to interfere with, restrain, or coerce the two employees in the exercise of their Section 7 rights.

I conclude that Wilcox also violated Section 8(a)(1) by telling Wells he ''could pay what he felt was necessary'' if the petition were ''successful''—a bald promise of benefit meant to induce her support of decertification.[21]

Having earlier concluded that Respondent's July 25 memorandum was not improper, I further conclude that Wilcox's distribution of it was lawful.

9. Assistant Store Manager Quinn's alleged misconduct

a. *The pleadings*

Paragraph 12 of the complaint alleges that, on a date uncertain in August 1989, Thomas Quinn, assistant store manager at Respondent's Bear Creek Village store, ''urged and directed an employee to sign a petition seeking decertification of the Union.'' Paragraph 14 alleges that Respondent consequently violated Section 8(a)(1). The answer denies these allegations.

b. *The evidence*

David Leininger, then an employee at the Bear Creek Village store, testified that Quinn overheard him express uncertainty to coworkers about signing a decertification petition, leading to this exchange:

> Quinn: What's your confusion about?
> Leininger: Well, if I sign it, am I going to rule the Union out?
> Quinn: No, it's just for a vote. Why? Are you going to sign it?
> Leininger: No.
> Quinn: Well, your buddies that you associate with in the store are on it.
> Leininger: Well, that's their decision. My decision in not to sign it.
> Quinn: Okay.

Addressing the same conversation, Quinn testified that Leininger told him he had not signed the petition ''because it meant voting the Union out,'' and he responded that Leininger would not be ''voting the Union out'' by signing, but simply ''asking for the election.'' With that, Quinn went on, Leininger said he had not seen the petition ''in a while and did not know where one was.'' Quinn admittedly then walked Leininger some 30 to 40 feet to the bulletin board in the breakroom, pointed to the petition posted there, and said: '' That's the petition . . . . By signing the petition, all you are doing is asking for an election to be held. You are not voting the Union out.''

Although Leininger's and Quinn's versions did not correspond in all significant particulars, neither contradicted the other. Both placed the conversation sometime in August.

c. *Conclusion*

Amalgamating their uncontradicted testimony, Quinn injected himself into a conversation involving Leininger and

[17] Crediting Farrington and Meador. Wilcox did not deny saying this.

[18] Crediting Farrington's unchallenged testimony on the point.

[19] Crediting Farrington's uncontradicted testimony.

[20] I credit Farrington that Wilcox evinced anger. She was a persuasive witness. Wilcox, admitting that he ''possibly'' raised his voice, did not seriously contest the point; and Meador's description of his ''tone of voice'' as ''stern, businesslike'' came across as magnanimous euphemism. Meador was Respondent's witness.

[21] Wells' account of this conversation was persuasive, whereas Wilcox's rendition was tentative and hazy. I credit Wells to the extent their renditions are in conflict.

his coworkers, asked Leininger if he was going to sign, countered his negative answer with the prod that his ''buddies . . . in the store'' had signed, and then walked him 30 to 40 feet to the posted petition and prodded him once more, stating he would only be ''asking for an election'' if he signed.

I conclude that this conduct, in totality, imparted pressures reasonably tending to interfere with, restrain, or coerce Leininger in the exercise of his Section 7 rights, and thus violated Section 8(a)(1).[22]

C. *Respondent's Allegedly Unlawful Change Concerning Union Visitations*

1. The pleadings

Paragraph 7 of the complaint alleges that, ''throughout'' their bargaining relationship, Respondent and the Union ''maintained a past practice of permitting the Union's business agents to contact unit employees in the stores, and . . . of union visitation in the stores''; that, on about July 29 and August 8, 1989, Michael Mack, the store manager at Respondent's downtown Bellevue store, ''threatened the Union's business agents with arrest, in the presence of employees, if the business agents continued to contact unit employees in the store''; and that, on about August 7 and 12, 1989, Dan Stivers, the store manager at Respondent's Factoria store, did likewise. Paragraphs 13 and 14 allege that Mack's and Stivers' actions constituted a unilateral change in the visitation practice, violating Section 8(a)(5) and (1).

The answer alleges that the parties had ''a past practice of permitting the Union's business agents to speak with Respondent's employees in the breakrooms of the stores, while the employees were not on working time.'' It denies the allegations of the complaint.

2. The evidence

a. *Background*

Joseph Peterson, the Union's president, testified that he told McNab, on July 5 or 6, 1989, that the Union would be undertaking ''more intense visitation than usual'' because of the decertification threat. He assured McNab, however, that the Union ''would service'' the stores ''as it had always serviced''; that its agents ''would not interfere with customer service''; and that ''if they needed to have an extended discussion with employees, they would do so on the employee's break or before or after the employee's work shift.''

Peterson's recital continued that he ''made it very clear'' to McNab, in this and later conversations, that the Union

> would continue to service in the fashion that it had always serviced, that it had a general rule with business agents and that is they were not to interfere with customer service. . . . The business agents would continue to introduce themselves to new employees, to tell employees that they would be in the store for a period of time and be able to meet with them later in the lunchroom to tell employees about the upcoming union meetings or general membership meetings, or to explain to people that they should attend a new-member meeting so they could find out about their job rights and what's contained in their contract . . . . I made it very clear that we would not change the way we were doing business, especially at a time when we were looking at a decertification.

McNab testified that Peterson said in the conversation of July 5 or 6 that business agents ''would be active in the Bear Creek Village store'' because of the decertification activity, and that she responded ''[T]hey will always be welcome in the store and entitled to conduct their business in the breakroom as they always have, and will play by the rules.'' McNab testified that Peterson ''didn't disagree with'' her. She admittedly did not ''elaborate'' concerning her perception of ''the rules.''

McNab recounted that she and Peterson had a second conversation, on July 11, in which she

> reiterated to him her understanding of the union business agents' access to the store; that . . . if they would not interrupt customer service . . . they were welcome in the store, that they should identify themselves to management and make their way to the breakroom to conduct their business.

Again, according to McNab, Peterson ''didn't disagree.'' The bargaining agreement was silent on the subject of union visitations.

The bargaining agreement was silent on the subject of union visitations.

b. *The Mack incidents*

1. Laurel Kyle

Laurel Kyle, a business representative whose territory included the downtown Bellevue store, visited that store on Saturday, July 29. She testified that she was checking the work schedule posted in the employee lunchroom when Store Manager Michael Mack told her that the store was ''extremely busy'' and that he consequently wanted her to ''confine'' herself to the lunchroom rather than talk ''to the people on the floor.'' This give-and-take ensued, according to Kyle:

> KYLE: Mike, I'm going to do just what I do everytime I come in. I don't see any reason to change my practices, and that's what I'll continue to do.
>
> MACK: You will stay in the lunchroom.
>
> KYLE: I will continue to do exactly what I've always done.
>
> MACK: You will stay in the lunchroom . . . or I will have you escorted out of the store.

Kyle described Mack's voice as ''close to a shout'' and his demeanor as ''hostile.''[23] She added that his ''body lan-

[22] True, Leininger seemingly invited Quinn to show him the petition by saying he did not know where it was. I do not see this as exonerative, however, for Quinn's prior remarks had begun to create a climate of coercion.

[23] Kyle testified that she ''understood'' Mack to mean, when he said he would have her escorted out, ''that he was either going to grab her himself or he was going to call the police and throw her out.'' The record contains no evidence, however, that Mack mentioned the police.

guage,'' caused her to think ''the man was going to grab'' her. Two named employees were present, she testified.

Mack's rendition, although more summary than Kyle's corresponded in major part. He denied, however, that he raised his voice.[24]

2. Dan O'Donnell

Dan O'Donnell, an assistant to the Union's president, Peterson, was in the downtown Bellevue store ''just before'' closing the night of August 8 or 9, handing out fliers informing the employees of a union meeting later that night.[25] He testified that, as he was talking to an employee stocking shelves on the sales floor, a woman who identified herself as a supervisor approached and announced, ''You can't do that, you're not allowed to talk to employees on the floor, he's working for me.'' O'Donnell introduced himself and explained his purpose, as he recalled, but the woman was unmoved, repeating that he was ''not to disrupt employees in the store.'' He defended that he was not ''disrupting'' anyone, because no customers were around, and she left to ''get the manager.''

Mack presently arrived, per O'Donnell, and told him he was not to ''approach employees on the floor'' because it was ''disruptive of business.'' O'Donnell protested that he was not ''disrupting'' business; that he ''had a right to talk to employees on the floor'' as long as ''an employee was not with a customer and [he] was not interfering with customer services or sales''; and that Mack ''should check with Sue McNab about that policy.'' Mack countered, according to O'Donnell, that O'Donnell was mistaken and that he would have him ''arrested'' if he did not desist.

O'Donnell's account went on that he ''reiterated what [he] thought were [his] visitation rights,'' and said Mack ''would be sued'' if he caused his arrest. Mack ''insisted again that, if [O'Donnell] didn't leave the store, he would have [him] thrown out''; and, after a few more words in that vein, O'Donnell proposed anew that Mack ''check with'' McNab. Mack replied that he had, and that she had instructed him ''specifically to tell [the union agents] that, if [they] attempted to talk to employees while they were on the floor . . . [they] were to be arrested or thrown out of the store.'' With that, O'Donnell concluded, Mack escorted him out the door.

O'Donnell testified that the employee with whom he had been speaking was ''right behind'' him—within 5 or 10 feet''—during much of this encounter. Mack testified, on the other hand, that he and O'Donnell went to the backroom, leaving the employee behind, before getting into the substance of their exchange. Mack's version otherwise, although more abbreviated, did not contradict O'Donnell's in significant detail. He concededly told O'Donnell he would have him ''escorted from the store'' if he ''wouldn't conduct his business in the breakroom.'' He neither admitted nor denied raising the prospect of arrest.

Jana Funamori, the ostensible supervisor who first confronted O'Donnell,[26] testified that she told him he could talk to the employees on their ''break time . . . in the backroom, but . . . not on company time, not on the selling floor.'' Funamori also testified that, while she did not hear the entirety of Mack's subsequent conversation with O'Donnell, she heard Mack say he could talk to employees during their breaks, ''but take it to the backroom.'' Funamori conceded that ''it wasn't very busy'' in the store at the time.

3. Jerry Patterson

Jerry Patterson, a contract administrator for the Union, and Pamela Blauman, a business representative, visited the downtown Bellevue store on Saturday, August 12. Respondent had shown a prodecertification videotape at several of the stores before opening that morning, and they were attempting to ''assess the damage.''[27]

Patterson testified that they had been there 10 to 15 minutes, talking to employees both on the sales floor and in the breakroom, when Mack approached him in the breakroom and exclaimed that he was ''tired of making the same speech to union representatives about access to the sales floor.'' Patterson shot back, he recalled, that he was ''tired of hearing the same speech''; that he had just heard it at the Factoria store;[28] that the union agents ''had access to the floor . . . as far as he was concerned,'' and had had for the 10-plus years he had ''been around'';[29] and that Mack could ''go ahead and arrest'' him, he would ''just sue.''

Blauman testified that she entered the breakroom in time to witness this. She gave this partial account:

> The manager came storming in. He was very angry and said that he was sick of us. ''I'm sick of you guys, I'm sick of telling you this. You don't have the right to be on the sales floor and talking to my employees.'' And he just kept going on that he was sick of us. And then Jerry explained to him the long past practice of servicing and talking to people on the sales floor and that we had access to the sales floor, and . . . they engaged in a conversation.

Blauman did not describe this additional conversation. Blauman testified that, before entering the breakroom, she had been

> talking to the people on the sales floor, and [she] went through the cashiers and handed out fliers on the sales floor about the antiunion video, that particular flier, [and] went back into the lumber department and was talking to people on the sales floor there.

She added, ''It was . . . busy that day, so I was kind of dodging back and forth between customers.''

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[24] Asked his ''tone of voice,'' Mack testified, ''I was annoyed, trying to maintain my professionalism.''

[25] Kyle was on vacation. O'Donnell and others were covering the store in her absence.

[26] Funamori testified that she ''ran'' the night stocking crew, that she was in the bargaining unit, and that she identified herself to O'Donnell as a supervisor and as ''in charge of'' the employee with whom he was talking.

[27] The General Counsel states in its brief that these events happened on August 8. The weight of evidence leaves scant doubt, however, that they occurred on August 12.

[28] Alluding to one of the Stivers incidents, described below.

[29] Before becoming a contract administrator, Patterson had been a business representative from 1981 to late 1987.

Mack recounted telling Patterson he ''would have him escorted from the store . . . if he wouldn't conduct his business . . . in the breakroom''; and that Patterson threatened to sue ''not only the company, but [Mack] personally'' should that happen.

McNab testified that Mack complained to her on August 12 that two union representatives ''had been talking to'' employees ''while they were checking customers out . . . had been walking up and down the aisles, [and had] refused to go to the breakroom.'' She admittedly told him he ''could have them arrested . . . if he didn't like it.''

c. *The Stivers incidents*

1. Dan O'Donnell

Dan O'Donnell, party to an early August confrontation with Michael Mack, described earlier, had an early August encounter with Dan Stivers, manager of the Factoria store, as well. O'Donnell testified that he was talking to three employees at work in that store's stockroom when Stivers approached and declared, ''Stop that, I've told you not to do that.'' O'Donnell responded, as he recalled, that he had ''the right to do that,'' prompting Stivers to state he would have O'Donnell ''arrested'' if he continued.

The two presently returned to Stivers' office, where the exchange continued for ''maybe five minutes.'' O'Donnell stated, so he testified, that he had ''a right to speak to'' the three employees, that the store always ''had been serviced'' that way, and that he would sue both ''the company'' and Stivers if Stivers ''had [him] arrested.'' Stivers came back, per O'Donnell, that McNab had ''instructed'' him ''not to allow'' union agents ''to speak to people on the floor,'' and that, indeed, he would have O'Donnell arrested if he ''persisted in talking to employees except in the designated area, which was the lunchroom.'' Stivers then brought the incident to a close, according to O'Donnell, by escorting him ''out of the front door.''[30]

Stivers recalled the matter quite differently. He testified that he first said to O'Donnell,[31] ''If you will go back to the breakroom, [I will] send employees back for you so that you can hold the discussion back there''; and that he then explained that the employees with whom O'Donnell had been talking were taking inventory and he ''did not want [O'Donnell] to disrupt the . . . inventory count.'' Stivers continued that after they moved to his office, O'Donnell ''basically'' claimed the ''right to go anywhere he chose at any given time,'' and Stivers expressed his ''understanding . . . that any of the discussions should be conducted in the breakroom as per Respondent's previous policy.''

O'Donnell also stated, according to Stivers, that Stivers would ''have to have him arrested and drug out in handcuffs'' before he would leave, and that he would ''sue'' Stivers and McNab should that happen. Stivers testified that he ''didn't say anything'' in response; that he was ''dumbfounded.'' He denied that he threatened O'Donnell with arrest.

2. Pamela Blauman

Pamela Blauman, identified above in connection with one of the Mack incidents, testified that she was talking to an employee in the nursery department of the Factoria store on August 12 when Stivers ''stormed down the aisle'' and proclaimed that she ''had no right to be talking to people on the sales floor and . . . would have to leave and go in the breakroom.'' Blauman assertedly responded that she was ''not interrupting customer service'' and that union agents ''had always serviced on the sales floor'' before. She added, by her account, that she was not ''going to go in the backroom,'' and suggested that Stivers call her boss, store security, or the police if he did not like it. Stivers said he would call the police, Blauman recounted, and left. Blauman remained in the store for a time without further incident.

Stivers testified that the store was ''extremely busy'' when he came on Blauman speaking with an employee, and that he consequently asked that she ''Go back to the breakroom,'' saying he ''would be happy to send the employee back.'' Blauman declined, insisting that she ''had the right to be anywhere she chose,'' Stivers recalled; and he, although agreeing that she had the ''right to be there,''[32] nevertheless asked her to ''please do it'' in the breakroom. Stivers testified that he also said he would ''get ahold of'' McNab ''and get some clarification'' because he understood that ''these discussions are to be done in the breakroom.''

Stivers denied that he said anything to Blauman ''about having her arrested'' or ''about calling the police.'' He testified that the conversation ''was very quick.''

3. Jerry Patterson

Jerry Patterson, who had words with Mack later on August 12 as previously described, accompanied Blauman to the Factoria store. They ''split up'' on arriving, so he did not witness the exchange between Stivers and Blauman. He heard about it, however, whereupon he confronted Stivers in Stivers' office. Patterson testified that he told Stivers he had been ''servicing stores routinely for a long period of time,'' had ''always had access to the bargaining unit on the sales floor,'' and could not understand the reason for ''a dispute regarding whether or not we now have the right to service them.''

Stivers answered, according to Patterson, that McNab had said at a managers' meeting that union agents ''weren't allowed on the floor''; that she and the Union's Peterson had so agreed. Patterson said he knew nothing of such an agreement, and that Peterson had said nothing ''about not servicing on the floor'' when Patterson saw him that very day. Patterson then tried to telephone Peterson. That was unsuccessful, so he called Dave Schmitz, the Union's organizing director. After describing the situation to Schmitz, Patterson gave the phone to Stivers. Patterson testified that, when he returned to the line, Schmitz said he had told Stivers that the Union had ''access to the floor and . . . intended to exercise its rights.''

[30] O'Donnell testified that he had intended to stay longer, but left rather than risk arrest.

[31] Stivers did not identify O'Donnell by name in his testimony. He testified that the union agent introduced himself at the outset of the incident, but that he could not remember the agent's name. I am satisfied, despite the discrepancies between his and O'Donnell's testimony, that they were speaking to the same incident.

[32] Stivers admitted so agreeing only after being faced with his affidavit during cross-examination.

After this call, Patterson testified, he asked Stivers for ''one small favor'': ''When you call the police and you have us arrested, at least have the decency to pull us off the floor.'' Stivers did not respond, according to Patterson, and he shortly rejoined Blauman. She reported that they had talked ''to everybody that's available,'' and they left.

Stivers' version generally corresponded with Patterson's.[33] He testified that Patterson ''basically'' stated he ''had the right to go anywhere he chose and do anything he wanted,'' and Stivers said his ''understanding with [McNab] is that all of those discussions with employees are to be done in the breakroom so as not to disrupt customer service.''

Stivers testified, as concerns the telephone conversation with Schmitz, that Schmitz said union agents had ''the right'' and would ''exercise [their] rights'' to go ''where they want to on the sales floor.'' Stivers recalled that he disagreed, saying his ''understanding'' from McNab ''was that all of these discussions were to be conducted in the breakroom,'' and that Respondent ''would supply the personnel to go back there.'' Schmitz dismissed that as ''bullshit,'' according to Stivers, and he gave the line back to Patterson.

Bridgette Dawley, a bookkeeper at the Factoria store, witnessed the Stivers-Patterson conversation. She recalled Stivers' saying he ''didn't have a problem with the [Union] talking to the employees so long as it's conducted in the breakroom and not out on the floor when they're trying to help people''; that Patterson said ''it was his right to talk to the employees . . . whether they were in the breakroom or not''; and that Stivers rejoined that ''the agreement was for the union representative to be able to talk to the employees in the breakroom only.''

McNab testified that Stivers reported to her on August 12 that two union agents ''had been talking to'' employees ''trying to wait on customers,'' that the agents ''had refused'' his request that they go to the breakroom, and that they told him ''to call the police and have them arrested . . . if he didn't like it.''

d. *Subsequent alleged conversations between McNab and Peterson*

McNab testified that after Mack's and Stivers' August 12 complaints to her about the conduct of the union agents at their two stores she reported to the Union's Peterson that representatives had been

> disrupting business on the floor, talking to employees on the floor, that it was a busy Saturday, that it was difficult for [Respondent] to conduct customer service properly on the floor with the reps talking to employees while they were working on the floor.

Peterson replied, according to McNab, that he ''would discuss it with the reps on Monday and that it was never his intention that the reps disrupt customer service.''

Clark Jennings, earlier identified as director of human resources, testified that he, too, was party to this conversation, although he placed it ''sometime in mid-July.'' He recalled that McNab ''outlined to Joe the concerns about what had occurred in the two stores,'' and that Peterson ''assured us'' that he would ''make sure that the union reps conducted themselves by going back into the breakroom and having conversations back there in the future.''

McNab testified that she had another conversation with Peterson, on August 14, in which he said ''once again'' that the Union had no ''intention to disrupt customer service.''

Peterson denied, on rebuttal, that the August 12 conversation occurred. He remembered a conversation with McNab ''shortly after'' Respondent's August 12 showing of the videotape, in which he voiced objections to the videotape and McNab complained that Laurel Kyle ''was spending too much time talking to the employees'' while ''servicing in the Bellevue area.'' Peterson denied that he agreed, in this conversation, to restrict the Union's in-store activities to the breakrooms.

e. *The Frank Shines incident*

In August 1989, Peterson had a conference telephone conversation with McNab and Jennings regarding the activities of a business representative, Frank Shines, at the Aurora Village store. Shines had been distributing grievance-settlement checks to employees on the sales floor,[34] and refused a request by Store Manager Steve Olsen that he confine himself to the breakroom.

Peterson testified that he asked McNab, ''What's going on?'' and she answered, ''I thought we had an agreement that the business agents would not talk to employees on the floor.'' Peterson assertedly rejoined:

> Sue, we've never had that agreement. I would have never agreed to it. I'm not agreeing to it now, and I'll never agree to it, and you know that. . . . I told you before [that] we're going to service the way we've always serviced before. Now, what's the problem?

McNab repeated her earlier comment about an agreement, according to Peterson, at which point Shines and Olsen entered in. Shines said he was ''not going to do anything differently,'' and Peterson declaimed:

> Sue, what the hell is going on? . . . [Y]ou know where we stand. We're not agreeing to any changes in the visitation. And if you arrest a business agent for doing his normal servicing, you're making a gigantic mistake and I think you better cool it.
>
> McNab said, per Peterson, ''I guess there is a misunderstanding.''
>
> McNab told a different story. She testified that she said to Peterson:
>
> Joe, there appears to be a problem. Frank Shines insists that he needs to walk around the floor and conduct his business with employees. You and I have agreed that the reps will not interfere with customer service; that they'll conduct their business in the breakroom.

McNab would have it that Peterson directed his response to Shines, stating:

> Frank, you know that's not our intention, to disrupt customer service. I request that you not interfere with

[33] Stivers did not identify Patterson by name, but as ''the guy that was in the backroom'' previously—an apparent allusion to O'Donnell and the previously described encounter between them. I am persuaded that Stivers thus misidentified Patterson.

[34] McNab conceded that this did not involve ''very many employees.''

> the employees as they're working. . . . [W]e'll discuss this further when I get back.[35] . . . [I]f you have any more problems, call Sue [McNab] directly.

Jennings offered yet another version: McNab told Peterson a ''problem'' had arisen concerning the visitation ''policy''; Peterson asked, ''What policy?'' McNab replied, '' [A]bout going to the breakroom and talking to employees in the breakroom''; and Peterson said he ''would talk to Frank.'' Shines then entered the conversation, according to Jennings, and Peterson asked him what he had been doing on the sales floor. Shines said he had been handing out grievance checks. Peterson asked if that took ''very long,'' Shines said it did not, and Peterson stated, ''Well, then, I suggest that you . . . go ahead and finish your business''—which Shines did.

Jennings testified that Peterson did not voice agreement with McNab's articulation of the visitation policy.

Jennings' recital continued that Olsen had called him, before this exchange, to report that Shines ''was in the store and was refusing to go to the breakroom.'' Jennings ''asked [Olsen] several questions, like was [Shines] interfering with customer service,'' and Olsen said he was. Olsen then put Shines on the line, and Jennings ''explained that [Respondent's] policy was that he go to the breakroom and conduct his business back there and not interfere with customer service.'' Shines shot back that ''that wasn't his practice [and] he wasn't going to do it.''

Jennings testified that he then tried to call Peterson and, being unsuccessful, he spoke with Janet Boyd, the Union's secretary-treasurer. He complained to Boyd that Shines ''was refusing to go to the breakroom as per our policy.'' Boyd replied that ''that can't be our policy''; that the Union did not ''have that policy with any of the retailers in the area.'' Jennings rejoined that Peterson had ''agreed to this''; and Boyd, declaring that Peterson ''would never agree to that,'' refused to ''direct'' Shines to ''conduct his business in the breakroom.''

f. *Other evidence of the past practice*

1. As perceived by union officials

Asked to describe the Union's ''practice . . . for contacting the employees in the stores,'' Peterson testified that he ''prefer[s] that the business agents be in the stores about every six weeks,'' but that they sometimes visit more or less often depending on circumstances. He described the routine visitation practice this way:

> [I]n most circumstances, as a matter of courtesy, a business agent will tell someone who is in charge, either a manager or department manager or assistant manager, that they're going to be in the store doing routine servicing. . . . And then they would go around and introduce themselves to every person that's working. They would go back into the nursery, into lumber, into hardware, into electrical. They would go [to] the cash registers. If they hadn't met a cashier, a new cashier, they would wait until the customers had . . . gone through the line and introduce themselves, say that they're going to be around in the store for awhile.
>
> They would go in and check schedules. So they'd have to look at [the] employer's payroll list or the actual schedule list or the sign-up sheet for people's work schedules and then they would have to check that list of employees that the company has provided them against the list that we have internally showing who is a member and who is not a member.

Peterson added that the practice with regard to Respondent's stores has undergone ''no change'' since he began with the Union, as a business representative, in 1977, and that:

> [T]he message to our staff has always been very clear. We don't want [the representatives] disrupting customer service, or getting between an employee and the customer.

Pamela Blauman, a business representative for 6 years, testified that her unvarying practice has been:

> [W]hen I enter the store, I go to the customer-service desk, which is on the sales floor. I go [to] the cashiers. . . . [I]f there is one or two customers in line, then I would wait through the line and talk to the cashier. If they're extremely busy, I would go behind the cashier and just leave my business card if I didn't know them, get their attention somehow, to let them know I'm in the store.
>
> And then I go to the nursery department and talk to the employees on the sales floor there, and go outside in the nursery. From there, I go to lumber and talk to the people on the sales floor there, and then go outside in lumber to see if anybody is unloading a truck or moving pallets. And then I usually go through the hardware, the plumbing, the electrical department, and then go back to the receiving room and then, finally, the breakroom.

Blauman testified that her visits ''usually'' last ''an hour or hour and 15 minutes.''

Laurel Kyle, a business representative for 7 years, gave this account of her visitation procedure:

> I start back to the lunchrooms, which are usually in the back of the store . . . . And I talk to whomever I see on the way. If there are questions that anybody has, I'll answer them on the way back. . . . So I would start back to the lunchroom and talk to people and let them know that I'm going to be in the store for awhile. I go back to the lunchroom and usually would pull either the payroll slips or the schedule, or both, and proceed to check my route pages against who is currently employed, who is on leave of absence, somebody that needs a withdrawal card, and that kind of thing. I usually stay in the lunchroom and talk to people. . . . [W]ho is there [determines] how long I'd be back there.

Kyle testified that she normally visits each store every 6 to 8 weeks, that her visits last from 30 minutes to 2 hours, and that she has followed this procedure, with one exception, ''since day one.'' The exception:

[35] Peterson was in San Francisco at the time.

> It used to be that I would sort of work my way back through the store. I still do that. But now I usually stand out at the customer-service counter and check off, because they have instituted a policy now where all the payroll slips are out at the customer-service desk, whereas before they were at the bulletin board at the back.

Ellen Brown-Smith, a business representative for over 3 years, testified:

> I go into the store. I will talk to the employees on the floor, making sure I don't disrupt customer service. If there are people in the breakroom when I go back there, I'll talk to them . . . as well.

Brown-Smith related that her ''contacts'' with employees on the sales floor are brief. She elaborated: ''If it is going to be lengthy, I'll try and either meet with them at their convenience when they have a break, or try to arrange to meet with them at a later date.'' She further testified that, unlike her practice in the stores, she does not ''routinely'' talk to employees in working areas at the Distribution Center, which is one of her assigned locations. She explained:

> The Distribution Center is a high-security and safety-factor area . . . . I have to sign in every time I'm there. And I do wear a visitor's badge and I am escorted up to the lunchroom. . . . There's equipment that's being driven. There is forklift driving, pallet-truck driving. It's more for safety factors.

Brown-Smith testified that she visits each location every 4 to 6 weeks, and has never altered her practice.

Jerry Patterson, a business representative from 1981 to late 1987, testified that the practice throughout his time was this:

> We were required or requested to get in every four to six weeks and get out onto the sales floor and speak with every individual that was a member of our bargaining unit, and we were to do that in such a way as to not unreasonably interrupt or interfere with the actual waiting upon the customers. For instance, if there would be a cashier with four or five individuals in line, obviously that person was preoccupied [and] had no business talking to us for anything, other than a hello if they caught our eye on the way back to another area of the store.

Patrick Stephenson, a business representative for about 18 months, testified:

> I walk in the door and, more often than not if I see the store manager, I will alert him to my presence . . . just so they know I'm in the store. I then . . . walk around the store and talk to employees about whatever, if there are any specific topics that I have to address, meetings coming up, that sort of thing, and just in general ask if there are any problems with scheduling, with hours, or any other problems with the contract, and that sort of thing.
>
> I'll always go back in the back room, to the lunchroom, and see if there are any employees in there, leave any notices or copies of contracts, make sure there is a copy of the contract posted, leave a few business cards for anybody who I don't see on the floor that day.

Stephenson testified that he learned this procedure from ''the person who had the job before'' he did, and that he ''was also given specific instructions by Joe Peterson.''

Joseph Wert, a business representative for two years, testified that he ''always talk[s] to members on the [sales] floor'' when he visits Respondent's stores, but that those conversations usually are ''short and succinct.'' He amplified: ''[I]f I think it's going to be something involved, I'll tell them that I'll call them at home that night or I'll meet them outside of work.'' Wert added that, if an employee is conducting ''business with a customer,'' he ''obviously [is] not going to stand and talk to [the employee] for ten minutes,'' but

> sometimes, if they're stocking shelves or something, I'll sit there and talk to them as they're working . . . . They'll tell me what's going on, what their manager did, if they didn't get lunch, tell me what's going on with other people, things like this.

Wert testified that this has been his practice throughout his tenure as a business representative, and that he visits each store ''anywhere between once a month to once every couple of months.''

2. As perceived by management officials

McNab testified:

> The practice has been that the union reps . . . enter the store and identify themselves to the manager on duty and proceed to walk to the back of the store, greeting people on the way with common-courtesy greetings, ''hello, how are you,'' and then conduct their business in the breakroom or the lunchroom area, which is at the back of the store.
>
> There may be a business or grievance process that needs to be handled. And that would be an appropriate item of their business. . . . The managers have been instructed that, if the business agent requests a time with an employee who may not have a break coming up or who is in the middle of dealing with a customer, or whatever, it might be that they are to be relieved by the manager or one of the other in the management staff and allowed to proceed to the breakroom to have a conversation with the union rep.

McNab testified that the practice ''had never changed,'' and that she learned about it ''through one of the human resource staff'' when she began with Respondent in 1987, ''and also in conversation with Joe Peterson.'' She did not flesh out those experiences.

McNab also testified that the practice is ''guide[d]'' by a 1981 grievance disposition concerning the Factoria store. That grievance, brought by Respondent's then-parent, Pay n' Save Corporation, alleged that a business representative ''pulled three employees off the sales floor for approximately 20 minutes each . . . to interrogate them . . . .'' A followup letter from the Company to the Union asserted that ''the same business agent came into the store'' a few days later ''and again was talking to clerks and cashiers on the floor.''

The form reflecting the disposition of the grievance states: ''Fred [Rosenberry, the Union's grievance director] indicates 'new business rep' to be assigned to that store. Not supposed to disrupt customer service.''

McNab additionally testified that her ''perception of the Union's visitation rights is influenced and shaped in part by'' the 1981 disposition of an unfair labor practice charge filed by the Union. The charge, against the parent Pay-n' Save, alleged that it had violated Section 8(a)(5) by

> refusing to allow the Union's business representative access to the Distribution Center employees at their work place for the purpose of policing the Union Contract and inspecting working conditions.

The Union later withdrew the charge, based on this understanding between it and the Company:

> The Union is willing to . . . limit [its] conversations with employees while they are on duty to a brief greeting and membership servicing in exchange for the Employer's agreement to allow general access to the work areas and cooperation in providing basic information at the Distribution Center that is needed to routinely administrate the Union contract. The Union will agree that if an employee has an inquiry that requires more than a brief response, the Union will defer the matter and follow up with the employee when they are off duty (i.e., lunch, breaks, after work, etc.).

Clark Jennings testified that the visitation practice was ''ongoing and never changed,'' and that he learned about it during ''a discussion'' involving Peterson, McNab, Kathryn Norris, and him about the procedure the Union should follow when investigating a certain grievance. Peterson agreed, according to Jennings, ''that, if they needed to talk to particular people, they could go to the breakroom and discuss it.''

Michael Mack, the manger of the downtown Bellevue store at relevant times, testified that he understood that ''the union rep could converse with his employees as long as it was conducted off of the floor and away from customers.'' Mack testified that he further understood that such conversations were to take place in the breakroom, and that he arrived at this understanding by observing the practice in stores where he worked.

John Phillips, Mack's counterpart at the Bear Creek Village store, testified that this has been the practice as it involved him:

> [W]hat I always try and do when I meet the union reps, I let them know that, you know, hey, let's work together and, you know, when you come in you're very welcome to go around and let the employees know that you're in the store. However, I don't want you taking a lot of their time on the clock while I'm paying them, and you're very welcome to talk with them in the lunchroom on their breaks or lunches, if they in fact want to talk with you.

3. The practice as seen by others

Iris Shannon, with Respondent some 23 years and now at the Aurora Village store, testified that ''the union rep, he comes in and he talks to everyone, no matter where you're at, if I'd be working nursery or I happen to be working cashier, and he'd always come and talk to you.'' Shannon testified that this was always the practice—''the union rep could talk to [the] employees wherever''—and that it occurred ''once a month or maybe twice a month, whenever they came to the store.''

Dawn Wyland, a customer service coordinator at the Sea-Tac Village store for 4 years, testified that the business representative would ''come in, let the employees know that they were there, maybe let them know if they wanted to speak with them, find out when their breaks were, ask them to come to the back room.'' That, Wyland averred, is ''the way it's always been.''

Linda Farrington, at the Sea-Tac Village store ''a little over three years,'' testified that the representatives let the employees know, as they are ''cruising through the store,'' that ''they'll be in the back room if you need to talk to them.''

Linda Horton, at the downtown Bellevue store for 14 years, testified that Laurel Kyle, the Union's representative servicing that store, ''would usually just come in and say 'hi' and 'how are you doing' and walk into the back room.''

Jane Funamori, with Respondent in various capacities for 12 years, testified that she had seen a union representative in the store ''once every six months'' or so during that time, she had never seen one ''talking to employees on the floor.''

3. Respondent's and the Union's stated positions

As noted above, Respondent alleges in its answer that the parties had ''a past practice of permitting the Union's business agents to speak with its employees in the breakrooms of the stores, while the employees were not on working time.''

Respondent contends in its brief that ''there was no change in practice regarding access,'' and that ''the practice'' as established by the weight of evidence ''was for union representatives to identify themselves to the manager, speak briefly with employees on the floor, and conduct any lengthy business in the lunchroom.''

But then, contradicting these assertions, Respondent's attorney stated in a position letter to the Board agent investigating the charge:[36]

> There was no established pattern for visitation by union representatives prior to the decertification drive, since they had not visited many stores for several years. However, once the petition drive started and union representatives began appearing in the stores . . . McNab and . . . Peterson reached an agreement that the union representatives would meet with employees in the breakrooms. If they wished to speak to specific employees, they would inform the store manager and the employee would be released from work to speak to the union agent.
>
> The Union states in its brief that it . . . does not dispute that its BRs are not to interrupt customer service when talking to employees on the sales floor or that it has the authority to pull employees off the sales floor. The Union agrees that lengthy discussions that interrupt

[36] Which letter was dated September 28, 1989.

> customer service should be held in the breakroom or elsewhere while the employee is off duty.

4. Conclusion

Weighing and synthesizing the considerable body of evidence on this issue, I find that:

1. A visitation practice existed before the onset of the decertification drive.

2. The practice evolved through practice and usage, never had been defined or formalized, and seldom had occasioned dispute between the parties.

3. As probably is inevitable given these circumstances, small variations in the practice existed from location to location depending on the experiences, styles, and perceptions of the business representatives and managers involved.

4. Variations notwithstanding, the practice did not *mandate* that the business representatives in all instances identify themselves to management before contacting employees. Nor did it preclude limited conversation between representative and employee on the sales floor or in other work areas, provided the conversation did not interfere with customer service or the employee's work. Extended conversations, however, were to be conducted on the employee's free time, or after the employee had received management approval to leave his/her assigned work, in the breakroom or some other place removed from work areas.[37]

5. During the decertification drive, as revealed by the several Mack and Stivers' incidents and that involving Frank Shines at the Aurora Village store, some of which included threats of arrest,[38] Respondent departed from the past practice by disallowing representatives from talking to employees on the sales floor and in other work areas.

6. So doing, Respondent claimed reliance on an agreement between McNab and Peterson supposedly providing

> that the union representatives would meet with employees in the breakrooms. If they wished to speak to specific employees, they would inform the store manager and the employee would be released from work to speak to the union agent.

7. That Respondent was relying on this alleged agreement is disclosed not only by the position letter, but by McNab's references to such an agreement in her conversation with Peterson, and Jennings' like references to the Union's Janet Boyd, in connection with the Shines incident; and by Stivers' remark to Jerry Patterson that McNab had said she and Peterson had agreed to exclude representatives from the sales floor.[39]

Turning to the law, I conclude that Respondent's departure from the past practice regarding visitation violated Section 8(a)(5) and (1) as alleged. The bases for this conclusion are these:

1. Visitation is a mandatory subject of bargaining. *American Commercial Lines*, 291 NLRB 1066, 1072 (1988); *Sacramento Union*, 291 NLRB 540, 550 (1988); and *Granite City Steel Co.*, 167 NLRB 310, 315 (1967). Any change in the established practice thus ''requires that the employer notify the bargaining representative and submit the proposed change to negotiation.'' Id. at 315. That the practice ''is not expressly embodied in the governing collective-bargaining agreement is immaterial.'' Ibid.

2. The record fails to establish that McNab and Peterson had reached agreement to restrict the visitation practice. Indeed, as if seeing the infirmities in its earlier position, Respondent asserts in its brief that ''there was no change in the practice''; and McNab and Jennings, despite their professed reliance on an agreement when arguing the Shines matter with Peterson and Boyd, likewise shifted ground, testifying that the practice had ''never changed.''[40]

3. Now disavowing its earlier position that it did effect a change, Respondent perforce does not contend, nor does the record establish, that the change was legitimized by a bargaining impasse, waiver, or some other validating circumstance.[41]

Conclusions of Law

Respondent promoted the Union's decertification in a manner violating Section 8(a)(1) in these respects:

1. By granting Charmaine Jovanovich greater in-store access to employees to promote decertification than it permitted representatives of the Union.

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[37] To the extent that this conflicts with McNab's description of the past practice, I do not credit her. Her testimony was frequently and obviously self-serving. I am not impressed by the 1981 dispositions of a grievance and of an unfair labor practice charge, said by McNab to have influenced her perception of the practice. The former merely affirmed the inarguable proposition that representatives are ''not supposed to disrupt customer service,'' while the latter dealt with the Distribution Center, which, as Ellen Brown-Smith testified, poses considerations not applicable to the stores.

[38] I credit O'Donnell that Mack threatened him with arrest during the incident of August 8 or 9, and that Stivers similarly threatened him during their early August encounter. I also credit Blauman that Stivers told her, on August 12, that he was going to call the police. Mack did not contradict O'Donnell, and while Stivers denied the threats attributed to him, McNab lent plausibility to O'Donnell's and Blauman's accounts by admittedly telling both Mack and Stivers to have the representatives arrested if they ''didn't like'' what they were doing.

[39] Crediting Patterson's uncontradicted testimony.

[40] The only arguable evidence of an agreement is McNab's testimony that she told Peterson on July 5 or 6 that the representatives would be ''entitled to conduct their business in the breakroom as they always have, and will play by the rules,'' and that Peterson ''didn't disagree with'' her; and her added testimony that she ''reiterated'' to Peterson on July 11 her ''understanding'' that the representatives ''would not interrupt customer service'' and ''should identify themselves to management and make their way to the breakroom to conduct their business,'' and that Peterson again ''didn't disagree.'' Even if these conversations occurred exactly as McNab described them, the first plainly contemplated adherence to the past practice (''as [they] always have''), and the second would hardly have put Peterson on notice that McNab was proposing change. Moreover, that Peterson ''didn't disagree'' cannot be equated with entering into an agreement having legal implications.

[41] This is not to say that, in all the instances earlier described, the Union's representatives were in conformity with the past practice. The record affords no reason to suppose, for instance, that Blauman's distribution of fliers on the sales floor on a busy Saturday, which entailed her ''dodging back and forth between customers,'' enjoyed the sanction of past practice; and Respondent properly could have stopped that. Instead of addressing specific instances of union overreach, however, Respondent unilaterally imposed a general change in the practice, and that is where it went wrong. *Granite City Steel Co.*, supra at 316.

2. Through Gadi Davidowitz, by interrogating Matt Reeves if he had ''heard about the petition,'' if he knew ''if there was one in the store,'' if he was ''carrying the petition,'' and if anyone had signed it; by urging Reeves to ''just try and remember'' to bring the petition to work ''tomorrow''; by recurrently asking Reeves how the petition ''was going'' and if people were ''supporting it''; and by asking Reeves from time to time who had and had not signed the petition.

3. Through Davidowitz, by asking employees, after commenting that he understood they had not signed the petition, why they had not.

4. Through Davidowitz, by asking Melissa Reynolds if she was going to or had signed the petition, and by remarking to Reynolds in the same conversation that the employees ''would get more hours and be able to move up quicker'' if the Union were gone.

5. Through Davidowitz, by telling Jerry Klep, in the context of prior comments that ''there would be a lot better wages'' should decertification succeed, that ''it would probably be to his benefit to sign'' the petition.

6. Through Davidowitz, by asking Jovanovich which employees had not signed the petition.

7. Through Phil Wilcox, by angrily lecturing Linda Farrington and Terri Anthony about a missing petition, and giving them an ultimatum that it be returned in 5 minutes, after calling them to his office with the explanation that he had seen their names on a prounion flier and they were among ''only a few people down in the breakroom'' when it disappeared.

8. Through Wilcox, in response to Frances Wells' complaint that Respondent needed to improve pay to attract and retain quality help, by stating he ''could pay what he felt was necessary'' if the petition were ''successful.''

9. Through Thomas Quinn, by urging David Leininger to sign a petition by asking if he was going to sign, remarking that his ''buddies . . . in the store'' had signed, and by then walking him to the posted petition and stating he would only be ''asking for an election'' if he signed.

Respondent violated Section 8(a)(5) and (1) by unilaterally altering the established practice with regard to in-store visitations by officials of the Union.

Respondent did not otherwise violate the Act as alleged.

REMEDY

Having concluded that Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

Inasmuch as Respondent sought to enforce its unlawful unilateral change concerning visitation by threatening union representatives with arrest, I further recommend that it be ordered to cease and desist from that conduct, even though the complaint does not allege those threats as independent violations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Ernst Home Centers, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting greater in-store access to those promoting decertification of United Food and Commercial Workers Local 1001 as the collective-bargaining representative of Respondent's employees than it permits representatives of Local 1001.

(b) Interrogating employees about their activities and intentions, and those of their coworkers, with regard to a campaign to decertify Local 1001.

(c) Urging employees to bring to work and sign petitions to decertify Local 1001.

(d) Promising better wages and greater opportunities for promotion if Local 1001 were decertified.

(e) Singling out employees for discussion concerning a missing decertification petition because, or with the explanation to them that, their names were on a prounion flier.

(f) Refusing to bargain collectively with Local 1001, as the exclusive representative of the employees in the appropriate unit described below, by unilaterally and restrictively changing the practice concerning in-store visitations by representatives of Local 1001. The appropriate unit is:

> All general sales clerks, cashiers, sales specialists, store helpers, custodians, janitors, and mechanics employed at Respondent's retail establishments and the Distribution Center within King County and Snohomish County within the jurisdiction of Local 1001, but excluding all other employees, guards, and supervisors as defined in the Act.

(g) Threatening representatives of Local 1001 with arrest to enforce its unlawful unilateral change in the practice concerning in-store visitations by those representatives.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the past practice concerning in-store visitations by representatives of Local 1001, and give Local 1001 written acknowledgement that this has been done.[43]

(b) Notify Local 1001, and, on its request, bargain in good faith with it, before altering the established practice with regard to in-store visitations by representatives of Local 1001.

(c) Post at each of its locations where employees in the above bargaining unit work copies of the attached notice,

[42] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[43] As I have found, the past practice does not mandate that those representatives in all instances identify themselves to management before contacting employees, nor does it preclude limited conversation between representative and employee on the sales floor or in other work areas, provided the conversation does not interfere with customer service or the employee's work. Extended conversations, however, are to be conduced on the employee's free time, or after the employee has received management approval to leave his/her assigned work, in the breakroom or some other place removed from work areas.

marked ''Appendix.''[44] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt, and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees customarily are posted. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing, within 20 days from the date of this Order, the steps Respondent has taken to comply.

Those allegations I have concluded to be without merit are dismissed.

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT grant greater in-store access to those promoting decertification of United Food and Commercial Workers Local 1001 as the collective-bargaining representative of our employees than we permit representatives of Local 1001.

WE WILL NOT coercively interrogate employees about their activities and intentions, and those of their coworkers, with regard to a campaign to decertify Local 1001.

WE WILL NOT urge employees to bring to work and sign petitions to decertify Local 1001.

WE WILL NOT promise our employees better wages and greater opportunities for promotion if Local 1001 was decertified.

WE WILL NOT single out employees for discussion concerning a missing decertification petition because, or with the explanation to them that, their names were on a prounion flier.

WE WILL NOT refuse to bargain collectively with Local 1001, as the exclusive representative of our employees in the appropriate unit described below, by unilaterally and restrictively changing the practice concerning in-store visitations by representatives of Local 1001. The appropriate unit is:

> All general sales clerks, cashiers, sales specialists, store helpers, custodians, janitors, and mechanics employed at our retail establishments and the Distribution Center within King County and Snohomish County within the jurisdiction of Local 1001, but excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT threaten representatives of Local 1001 with arrest to enforce our unlawful unilateral change in the practice concerning in-store visitations by those representatives.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL restore the past practice concerning in-store visitations by representatives of Local 1001, and WE WILL give Local 1001 written acknowledgement that this has been done.

WE WILL notify Local 1001 and, on its request, bargain in good faith, before altering the established practice with regard to in-store visitations by representatives of Local 1001.

ERNST HOME CENTERS, INC.